

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-6153

Signed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK A. DELORENZO,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

APPENDIX

SCOTT P. CRAMPTON,
Assistant Attorney General,

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United States Attorney.



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DATE	PROCEEDINGS	Date of Judgment
1971		
June 29	Filed Complaint	
July 6	Issued Summons - 1 Orig. and 4 Copies and delivered to U. S. Marshal for service	
" 13	Filed summons served on Alfred R. Tyminski, Asst. U.S. Atty on 7/8/71; served on t. Attorney General 7/7/71 by certified mail, receipt #533750	
Sept. 10	" Answer	
1972 21	" Interrogatories to plaintiff	
Aug. 15	" Notice of Motion returnable Sept. 11, 1972 at Syracuse. Motion to compel answer to Interrogatories and affidavit	
Sept. 11	Motion for order compelling plaintiff to answer defendants interrogatories granted. Order to be submitted	Mot
Nov. 20	Filed Order (11/16/72) that plaintiff shall serve his answers to certain interrogatories within 15 days after service of this Order (Port. D.J.)	
1973		
Feb. 6	" Notice of Motion returnable Feb. 16, 1973 at Syracuse. Motion to dismiss for failure to make discovery, memorandum in support of motion and certificate of service by mail	
" 16	Motion to dismiss. Adjourned to Mar. 5 at Albany on consent	
Mar. 5	Motion to dismiss. Withdrawn	
1974 8	Filed Interrogatories	
Mar. 29	Alert notices mailed	
1975		
Jan. 7	Filed Note of Issue March - 1975 - Albany - Court	
Mar. 28	Pretrial conference 2 1/4 hour - JTF	
May 20	Filed Trial Brief for the defendant	
May 21	Pretrial conference (1/2 hour)	
May 21	TRIAL. Witnesses for Plaintiff. Defendant moves for dismissal. Decision Reserved. Plaintiff moves for directed verdict. Decision Reserved. Witnesses for defendant. Defendant moves for dismissal. Decision reserved. Plaintiff moves for a directed verdict. Decision reserved. Decision Reserved. Two weeks for each side to file and exchange briefs after the receipt of transcripts. One week for each side to file answers.	
1976		
Jan. 13	Off dismissal calendar.	
Mar. 25	Filed Defendant's Proposed Findings of Fact and Conclusions of Law	
Mar. 25	Filed Post-Trial Brief for the Defendant	
Mar. 25	Filed certificate of service of post trial brief and proposed findings of fact and conclusions of law	
July 9	Filed Memorandum-Decision and Order of Judge Foley (7/9/76) dismissing the complaint and on the counterclaim, the defendant is entitled to recover from the plaintiff the sum of \$2,801.44.	
July 9	Filed Judgment and mailed cards, re: Judgment to Etkin & Stark, Esqs. and Hon. James M. Sullivan, Jr. U. S. Attorney and Jerome Fink, Esq.	
Sept. 2	Filed Notice of Appeal by U. S.	
Oct. 14	Filed Transcript of proceedings which took place at Albany, New York before Hon. James T. Foley on May 21, 1975	
Oct. 14	Filed Post-Trial Brief for the Plaintiff	
Oct. 14	Filed Plaintiff's Proposed Findings of Fact and Conclusions of Law	
Oct. 18	Filed receipt for papers sent to C.C.A.	
Oct. 14	Sent Certified copy of Record on Appeal to CCA. 2nd Cir.	

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

3 -FRANK A. DeLORENZO Plaintiff,
4 - -against-
5 -UNITED STATES OF AMERICA Defendant.
6 -----

7 71-CV-290

8 The following proceedings took place at the United
9 States District Court, Federal Building, Albany, New
10 York, on the 21st day of May, 1975, before HONORABLE
11 JAMES T. FOLEY, United States District Judge.

12 A P P E A R A N C E S:

13 ETKIN & STARK, ESQS.
14 DAVIS M. ETKIN, ESQ.
15 Of Counsel
16 Attorneys for Plaintiff
17 833 Union Street
18 Schenectady, New York

19 JAMES M. SULLIVAN, JR.
20 United States Attorney
21 THOMAS M. LAWLER
22 Trial Attorney
23 Tax Division
24 Department of Justice
25 Attorney for U. S. of America
Washington, D. C.

[Tr. 13]

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FRANK A. DE LORENZO

called as a witness on his own behalf being first
duly sworn was examined and testified as follows:

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1 THE COURT: What bearing does that have?

2 MR. LAWLER: Just so the record shows all three
3 of these gentlemen were charged with the same
4 offenses.

5 MR. ETKIN: That is my point here, Your Honor,
6 and I stipulate that.

7 THE COURT: He stipulates it and I will receive
8 this and that clarifies it.

9 (A document marked Plaintiff's Exhibit for
10 identification marked in evidence.)

11 BY MR. ETKIN:

12 Q There seems to be an issue here and a question as
13 to when the world series took place back in 1967,
14 do you recall to the best of your recollection
15 whether the world series was on on October 4?

16 A That was the world series.

17 Q It was on that day?

18 A Yes.

19 THE COURT: Who was playing? Maybe you don't
20 remember.

21 THE WITNESS: I don't.

22 THE COURT: All right.

23 BY MR. ETKIN:

24 Q During the period of time here in question are you
25 able to estimate on a daily basis the volume of

1 business that you did in all types of illegal forms
2 of gambling activities, that is, including horses,
3 numbers, baseball, even -- any other types of wagers
4 that you may have taken, are you able to estimate
5 how much you did on a daily basis?

6 A You mean average?

7 Q Yes.

8 A About \$100 or \$150 a day.

9 Q And I think mathematically that approximates \$10,000
10 during this time in question.

11 A Yes.

12 Q Other than the wagers that were taken from your
13 possession on October 4, did you have any wagers --
14 wagering slips located anyplace else that you took on
15 that particular day?

16 A I had all my bets in my pocket.

17 Q And you say none of the betting slips were found in
18 the BelAir Men's Shop that the State Police told you
19 were found were your wagers?

20 A I had no idea those bets were even there.

21 Q Did you keep any books or records during this period
22 of time?

23 A No, sir.

24 Q All your books and records were these slips, is that
25 correct?

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1 MR. LAWLER: Thank you.

2 BY MR. LAWLER:

3 Q After the seizure of these gambling slips by the
4 State Police, did you ever go down to the State
5 Police Barracks to examine the gambling slips?

6 A No.

7 Q Did you ever ask to have the gambling slips returned
8 to you?

9 A No, I did not.

10 Q Now it is your testimony that during the period
11 August 1 to August 4, 1967 you did business gambling
12 to the extent of \$100 to \$150 --

13 A --What were those dates?

14 Q August 1, 1967 to the day of the arrest in October
15 of 1967.

16 A That's what I averaged, yes, sir.

17 Q But once again you have no records, no slips to
18 indicate that that is true or false, do you?

19 A No, sir, you know I don't.

20 Q Just to clarify the record, sir, it is your testi-
21 mony I believe that every work day during this period
22 you were engaged in the gambling business, you took
23 bets, is that correct?

24 A Pardon me?

25 Q It is your testimony that every day -- every work day

1 from August 1 to October 4 you took bets, you were
2 engaged in the gambling business?

3 A I would say five or six days a week, yes.

4 Q And once again, if this question was asked I
5 apologize, you plead guilty to possession of
6 gambling records in the second degree?

7 A Yes.

8 Q Two counts, correct?

9 A I don't know. Did I Dave?

10 THE COURT: Well, the record will show.

11 (A document marked Defendant's Exhibit A
12 for identification.)

13 MR. LAWLER: Will you stipulate to it?

14 MR. ETKIN: If you show it to me.

15 Your Honor, I will stipulate that all three
16 parties Viscusi, Puglio and DeLorenzo pleaded
17 guilty to two counts of -- dealing with possession
18 of betting slips and policy slips. I don't see any-
19 thing here about world series bets, but I will
20 stipulate the policy slips and betting slips.

21 THE COURT: Where did they plead guilty?

22 MR. ETKIN: In County Court.

23 THE COURT: Before what Judge?

24 MR. ETKIN: It was before Judge -- I am sorry,
25 Your Honor, it was in Supreme Court before Honorable

[Tr. 95]

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JACK A. GASBARA

called as a witness on behalf of the Plaintiff being
first duly sworn was examined and testified as
follows:

DIRECT EXAMINATION BY MR. ETKIN:

1 Q State your full name.

2 A Jack A. Gasbara.

3 Q Where do you reside?

4 A Tamarac Lane, East Greenbush, New York.

5 Q And can you tell us what your business or profession
6 is?

7 A I am an investigator with the New York State Police.

8 Q Were you with the State Police back in '67?

9 A Yes.

10 Q And were you involved in a gambling raid made in the
11 city of Schenectady on October 4, 1967?

12 A Yes.

13 Q Can you tell us what part you played?

14 A Previous to the raid itself I was an undercover
15 investigator.

16 Q And when did you start this type of work? Under-
17 cover work on this particular case.

18 A I can't give you the date exactly, but it must have
19 been in the first week of August '67.

20 Q And on August 1, 1967 did you pursue the course of
21 this undercover work?

22 A Yes.

23 Q And in the course of your duties and responsibilities
24 were you involved in the arrest of Frank DeLorenzo?

25 A I was involved to a degree, I did not make the

1 arrest.

2 Q How were you involved?

3 A I conducted a surveillance of Mr. DeLorenzo and his
4 BelAir Men's Shop and other premises in and through-
5 out Schenectady.

6 Q Did you make a bet with Mr. DeLorenzo?

7 A No.

8 Q Did you ever make a bet with Mr. Viscusi?

9 A Yes.

10 Q Did you ever make a bet with Mr. Puglio?

11 A No.

12 Q But you did make a bet with Mr. Viscusi, is that
13 correct?

14 A Yes.

15 Q Where did you make that bet with Mr. Viscusi?

16 A At Art's Variety Store on Broadway in Schenectady.

17 Q Now were you in the vicinity or the area at the time
18 that Mr. DeLorenzo was arrested?

19 A I don't recall exactly what my assignment was on
20 that day.

21 Q Did you know there was a search warrant for Mr.
22 DeLorenzo?

23 A Yes.

24 Q And were you present when that search warrant was
25 executed?

1 A No.

2 Q From your own personal knowledge do you know what
3 was taken from Mr. DeLorenzo's person at the time
4 he was arrested on October 4?

5 A No.

6 Q Did you ever have occasion at any future time to
7 go over any slips, gambling records, betting records
8 that were taken from Mr. DeLorenzo on October 4, 1967?

9 A I honestly don't recall.

10 Q Did you make any record of -- or document of the
11 course of your investigative work on October 4?

12 A No.

13 Q And you say you don't recall whether you ever looked
14 at any betting slips that were taken from the
15 possession of Mr. DeLorenzo?

16 A I don't recall.

17 Q So that you wouldn't know whether they were horse
18 bets or policy bets or world series bets, would you?

19 A That were taken?

20 Q That were taken from his possession.

21 A No, I don't recall.

22 Q Did you know that there were some slips taken or
23 found in the BelAir Men's Shop, from your own
24 personal knowledge?

25 A I assume after the arrests were made.

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1 Q No, I am just asking you from your own personal
2 knowledge.

3 A I don't recall.

4 Q From your own personal knowledge you don't have any
5 knowledge or information with regard to a search
6 made at the BelAir Men's Shop?

7 A No.

8 Q Were you present when the search was made?

9 A No, sir.

10 Q Were any slips given to you by anybody at a later
11 date at which you calculated the amount that was
12 on the slips taken from the BelAir Men's Shop?

13 A I don't recall.

14 Q You don't have any recollection what kind of bets
15 they were or you don't recall whether you did this
16 particular type of work?

17 A I don't recall whether I did this particular thing.

18 Q You couldn't identify any particular slips as being
19 taken from either Mr. DeLorenzo or from the BelAir
20 Men's Shop, isn't that true?

21 A That is true.

22 Q Did you know that Mr. Puglio was arrested?

23 A Yes.

24 Q Did you know that Mr. Viscusi was arrested?

25 A Yes.

1 Q And did you know that Mr. DeLorenzo was arrested?

2 A Yes.

3 Q And did you know the disposition with regard to the
4 three of them?

5 A No, sir.

6 Q You said that you did certain type of undercover
7 work, is that correct?

8 A Yes.

9 Q And were you the only undercover agent at the time
10 working on this particular case?

11 A No.

12 Q There were other agents?

13 A Yes.

14 Q And who were they, do you remember?

15 A One in particular that worked with me on the days
16 that I was working on this particular investigation
17 was an investigator by the name of Propst?

18 Q Were you assigned to anyone with a particular
19 individual that have been mentioned here, Viscusi,
20 Puglio or DeLorenzo, were you assigned to any one
21 of those individuals in particular?

22 A No, just a general investigation.

23 Q You say you never made a bet with Mr. DeLorenzo?

24 A That's correct..

25 Q Did you ever see anybody else place a bet with

1 Mr. DeLorenzo?

2 A Yes.

3 Q Who was that?

4 A An unknown male subject.

5 Q And where was this?

6 A In front of the BelAir Men's Shop.

7 Q Outside in front?

8 A Yes.

9 Q And when was that, do you remember?

10 A I believe it was in and around August 9 of 1967.

11 Q Where were you at the time that the bet was being
12 placed?

13 A I was in a van truck directly in front of Mr.
14 DeLorenzo's car.

15 Q And you could observe -- how did you know that it was
16 a bet that was being made?

17 A Well, I observed a male subject come to Mr.
18 DeLorenzo, had pulled up behind my van, and he was
19 waiting in the car, and the male subject walked over
20 to the car and he had an Armstrong Daily Newspaper
21 in his hand and he was pointing to the Armstrong
22 and talking to Mr. DeLorenzo, and at the time he
23 was talking Mr. DeLorenzo was writing on a piece of
24 paper, and this unknown male was pointing to the
25 Armstrong and then he handed Mr. DeLorenzo some

1 money.

2 Q And you saw money pass hands, is that correct?

3 A Yes.

4 Q And Mr. DeLorenzo did take a wager from this in-
5 dividual, correct?

6 A Yes, sir.

7 Q And did you see Mr. DeLorenzo take any wager from
8 any other individual?

9 A Yes, sir.

10 Q How many times would you say?

11 A Several times.

12 Q Well, is that four or five or six?

13 A Yes, sir.

14 Q And you were on this case from when, August 1 to
15 October 4, correct?

16 A I think my last official act was somewheres around
17 September 26th.

18 Q So approximately almost two months, is that right?

19 A Yes, sir.

20 Q And during the course of this two months you only
21 saw Mr. DeLorenzo take four out -- four or five
22 wagers, correct?

23 A Yes, sir.

24 Q And did you ever see Mr. Puglio take any bets?

25 A I never saw him actually take wagers, no, sir.

1 Q What do you mean by actually?

2 A Another individual hand him a wager. I saw him
3 with wagers in his possession.

4 Q You did see him then have wagers?

5 A Yes.

6 Q And how long did you have Mr. DeLorenzo under
7 surveillance?

8 A From August 1 to September 26.

9 Q And were you out in the front of the store all dur-
10 ing this particular period of time?

11 A It would vary, I might be in front of his store one
12 day and the next day I might be in another location,
13 then the following day I might be again in front of
14 his store. I also followed him around the city.

15 Q Can you give me an idea of what time you started
16 your work during the day or evening?

17 A I would generally pick up Mr. DeLorenzo about
18 roughly 1:00 in the afternoon.

19 Q And how long would you stay with him about?

20 A Generally until he returned to the BelAir Men's
21 Shop with paper bags.

22 Q What time would you say this was?

23 A It could be anywhere from one to two-thirty.

24 Q So you actually kept him under surveillance about
25 one and a half hours each day, correct?

1 A Yes.

2 Q And was this each and every day you followed this
3 same procedure?

4 A No, sir.

5 Q Were there days that you didn't keep them under
6 surveillance?

7 A Yes, sir.

8 Q How many days during the period of time from
9 August 1 to September 26 would you say you didn't
10 keep him under surveillance? Half of the time, a
11 third of the time, three-quarters of the time?

12 A A third of the time is a safe estimate.

13 Q In other words about a third of the period of the
14 time from August 1 to September 26 you were not with
15 Mr. DeLorenzo?

16 A That is possible.

17 Q In no -- in any event six days of total between the
18 -- between August 1 and September 26th, or October
19 4, you were not with Mr. DeLorenzo during that
20 entire 56 days?

21 A Would you repeat that question please?

22 Q It is alleged that Mr. DeLorenzo was under sur-
23 veillance for 56 days, and I am asking you, or you
24 already testified that you did not have him under
25 surveillance for this total period of 56 days, you

1 personally?

2 A Not for the total, no, sir.

3 Q And you say that it was at least about a third less
4 than this period of time?

5 A Yes sir.

6 Q And during this period of time you only saw him
7 take four or five wagers, is that correct?

8 A Yes, sir.

9 MR. ETKIN: I have no further questions.

10 CROSS EXAMINATION BY MR. LAWLER:

11 Q Mr. Gasbara, how long have you been with the State
12 Police?

13 A 14 years.

14 Q What year did you start sir?

15 A 1961.

16 Q And how long were you involved in gambling investi-
17 gations for the State Police?

18 A I specialized in gambling for approximately two
19 years.

20 Q And which two years were they, sir?

21 A They would have been '67 and part of '68.

22 Q You say you specialized in gambling, what does that
23 mean?

24 A In other words I did nothing else, my duties con-
25 sisted only of gambling investigations.

1 Q And what were those duties?

2 MR. ETKIN: I will concede that this officer
3 is a well qualified officer of the State Police
4 versed in the field of gambling and I will accept
5 his qualifications as an expert.

6 THE COURT: All right.

7 BY MR. LAWLER:

8 Q Sir, as an expert in the field of gambling you had
9 the Plaintiff Mr. DeLorenzo under your surveillance
10 for the period August 1 through October 4, 1967,
11 correct?

12 A Approximately, yes.

13 Q Now based on your observations, what in your opinion
14 was the extent of his gambling activity?

15 MR. ETKIN: Your Honor, I object, there is no
16 foundation laid for that particular question, it is
17 asked what is the extent, that is not an expert's
18 testimony, that is speculation.

19 BY MR. LAWLER:

20 Q Do you have an opinion of what this gentleman took
21 each day with respect to gambling activities?

22 A Yes.

23 Q What is that opinion?

24 MR. ETKIN: I object to that, Your Honor,
25 there has been no foundation laid. He said he

1 didn't know what slips, he only saw him take four
2 or five wagers. I think the whole question is
3 immaterial, and as I say it is not a question.

4 THE COURT: I am going to allow it. I will
5 let him give his opinion. You can cross examine
6 him as to what he bases it on.

7 Do you know what he is asking you now,
8 Investigator?

9 THE WITNESS: Yes.

10 THE COURT: From your surveillance, your expert-
11 ness these two years when you were doing this func-
12 tion, can you tell from those observations, your
13 experience, the extent of his daily activity in
14 gambling?

15 THE WITNESS: Yes, sir.

16 THE COURT: You can tell us?

17 THE WITNESS: Well, I can give you my opinion.

18 THE COURT: All right.

19 BY MR. LAWLER:

20 Q That is what I am asking, what is your opinion?

21 A My opinion is there is a minimum of \$2,000 taken in
22 per day.

23 Q Now sir, isn't it true that with respect to this
24 arrest made of the Plaintiff made on October 4, 1967
25 you were instrumental in terms of getting a search

1 warrant issued, is that correct?

2 A Yes.

3 Q Did you make an affidavit to have that search
4 warrant issued?

5 A Yes.

6 (A document marked Defendant's Exhibit C for
7 identification.)

8 Q I am going to show you what has been marked as
9 Defendant's Exhibit C and ask you if you recognize
10 that document?

11 A Yes.

12 Q Could you please tell Judge Foley what that document
13 is?

14 A It is an affidavit for a search warrant.

15 THE COURT: Your affidavit?

16 THE WITNESS: Yes.

17 THE COURT: What date is it dated?

18 MR. LAWLER: I may have a better copy in the
19 file that would indicate the date.

20 BY MR. LAWLER:

21 Q What date was the warrant signed by the Supreme
22 Court Judge?

23 A October 3, 1967.

24 Q Would you have made an affidavit on that day or
25 immediately preceding that day in the normal course

1 of issuing affidavits and a warrant?

2 A I would have sworn the affidavit on that date.

3 Q That date being October 3?

4 A Yes.

5 MR. LAWLER: Your Honor, at this time I move
6 that Defendant's Exhibit C be introduced into
7 evidence.

8 MR. ETKIN: Your HONor, I object to this going
9 into evidence, it is before the fact of the arrest,
10 it has nothing to do with anything that happens
11 subsequent to the time, at the time or subsequent
12 to the time the arrest was being made, it has nothing
13 to do with the picking up of slips or any of the
14 financial information involved in this case. The
15 officer is here, he is the best witness as to what
16 went on, and he is here to testify and I object to
17 this going into evidence.

18 THECCOURT: What is your purpose?

19 MR. LAWLER: My purpose, Your Honor, is this.
20 First of all, contrary to what Mr. Etkin says- -
21 the period involved in issue here, the entire
22 period from August 1 to October 4, so in that
23 regard, certainly that document is very relevant
24 to the period in issue. Secondly, Your Honor, your
25 -- this officer made certain observations of the

1 plaintiff --

2 THE COURT: He makes an important point,
3 Mr. Etkin, he is here to tell us about it, why do
4 you need an affidavit?

5 MR. LAWLER: We are testifying to events that
6 occurred in 1967, it seems to me that an affidavit
7 submitted during the relevant period --

8 THE COURT: He can read that and refresh him-
9 self.

10 MR. LAWLER: Fine, Your Honor, I will have him
11 do that.

12 THE COURT: He is here, that is the big point.

13 BY MR. LAWLER:

14 Q Would you please detail for us what you did day in
15 day out with respect to observing the plaintiff?

16 MR. ETKIN: I am going to ask that it be
17 pinned down to a specific date, to a specific time
18 so that we don't sit here all day and go far afield.

19 MR. LAWLER: That is exactly the purpose of
20 this document. Mr. Etkin can't have it both ways.

21 THE COURT: No. From August 1 to September
22 something that is what we are interested in.

23 MR. LAWLER: To October 4, that's correct,
24 Your Honor, that is the period my question goes to.

25 THE COURT: All right, he can tell us.

1 BY MR. LAWLER:

2 Q What did you do, when did you start to observe him?

3 What did you observe on a day in day out basis?

4 A Starting with the first of August I would travel in
5 a van type vehicle that had a glass side on the
6 driver's side plus glass in the back where you
7 could only see out of and noone could see into the
8 vehicle. I would park in front of the BelAir Men's
9 Shop -- well, I actually wouldn't park, the other
10 investigator would drive the vehicle, park in front
11 of the men's shop, I would be hidden in the rear of
12 van with a pair of field glasses. The other investi-
13 gator would lock the vehicle and walk away leaving
14 me locked inside the van to observe whatever I
15 observed. For the first two weeks in August roughly
16 I observed Mr. DeLorenzo pull in front of the
17 Men's Shop, roughly between the hours of one and
18 say two-thirty, and exit with several paper bags
19 into the BelAir Men's Shop.

20 Q What type of bags would these be?

21 A Paper bags.

22 Q Large ones, small ones?

23 A I would say roughly five pound, ten pound paper
24 bags.

25 Q Could you please continue?

1 Q Could you please continue?

2 A I have never seen Mr. DeLorenzo exit the BelAir
3 Men's Shop with a paper bag in his hand.

4 Q Your testimony is he would take these paper bags
5 inside, but when he came out he wouldn't have them,
6 is that correct?

7 A Yes, sir.

8 Q Please continue.

9 A During the course of the investigation in the city
10 of Schenectady I had information from a confidential
11 informant that --

12 MR. ETKIN: I am going to object to anything
13 he got from somebody else, any testimony relating
14 to any hearsay.

15 MR. LAWLER: He hasn't said it yet. I think
16 the proper procedure would be to have it stricken
17 once it is said.

18 THE COURT: We are going to get into a compli-
19 cated field of law where we have the informer. Do
20 you want to do that in this civil case?

21 MR. LAWLER: Your Honor, I want the witness
22 to testify as to what --

23 THE COURT: Sometimes they want to protect
24 those people.

25 MR. LAWLER: Your Honor, I want the witness to

1 testify as to what he observed. If certain objections
2 are made, we will treat with the objections.

3 THE COURT: The informant --

4 MR. LAWLER: I am not going into that.

5 THE COURT: Let him tell his observations.

6 BY MR. LAWLER:

7 Q What else did you observe?

8 A During the course of the investigation I had infor-
9 mation from a confidential informant that Arthur
10 Viscusi was taking wagers at Art's Variety Store,
11 and of course he was also placed under surveillance.

12 MR. ETKIN: Your Honor, I don't know what that
13 has to do with this case.

14 THE COURT: Well, it is in now.

15 MR. LAWLER: We are going to connect that up
16 if we can have a reservation on the ruling of that
17 objection.

18 THE WITNESS: On several occasions I was
19 within Arthur Viscusi's establishment and wagers
20 -- when wagers were taken by Mr. Viscusi. Also I was
21 in Art's Variety Store when Mr. DeLorenzo came in,
22 the exact date I am not sure of, I can probably
23 refresh my recollection with my affidavit. However,
24 it was around the 14th, I believe, of August, some-
25 wheres in that vicinity.

1 Mr. Viscusi handed Mr. DeLorenzo some papers
2 with figures and numbers on it and also handed him
3 some money that was intermingled, and I recall him
4 saying "Watch it today, there's some heavy doubles
5 in there," and Mr. DeLorenzo said -- I think he
6 said "Don't worry, I'll take care of it."

7 They went towards the back room of the estab-
8 lishment and I heard the word "payoff" used.

9 On the way back, Mr. DeLorenzo reached under
10 the counter and took a paper bag and put slips of
11 paper and the money into the paper bag.

12 BY MR. LAWLER:

13 Q What size paper bag would that be, would it be
14 similar in size to the ones you saw Mr. DeLorenzo
15 carrying into the BelAir Men's Shop?

16 A Yes, sir.

17 Q Please continue.

18 A After a short period of time Mr. DeLorenzo and
19 Mr. Viscusi exited from the back room of Art's
20 Variety Shop, and Mr. DeLorenzo left the premises
21 with the bag and got in his car.

22 Q Did the occasion ever arise when you went inside
23 the Shop?

24 A Yes.

25 Q When did that occur?

1 A Again it was seven years ago, I think it was
2 around roughly the 18th of August.

3 Q And upon entering that shop, what if anything did
4 you observe?

5 A There was no one else in the store at the time. I
6 walked to the rear of the store and there was a man,
7 a white man, he had slips on the table with numbers
8 and writing on them, and as I approached the table
9 at the rear of the store he quickly covered them
10 with a newspaper. However, I knew they were betting
11 slips.

12 Q Your observation of those slips with respect to the
13 number of slips, could you approximate how many
14 there were?

15 A Well, approximately I would say ten slips.

16 Q Sir, are you aware of the fact Al Puglio alias Al
17 Collins worked in the BelAir Men's Shop?

18 A Yes.

19 Q Sir, as an expert would it be typical for a gambler
20 to employ others in his operation?

21 MR. ETKIN: Other than what, I don't under-
22 stand the question and I object to it because of
23 the form.

24 THE COURT: Maybe you can rephrase it.

25 BY MR. LAWLER:

GASBARA REDIRECT

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1 Q Sir, do principals in gambling operations, by that
2 I mean the boss of the gambling operation, would
3 he on any occasion that you know of as an expert,
4 employ others to act on his behalf in terms of
5 going out and getting bets for -- or accepting bets
6 for his benefit?

7 A Yes, sir.

8 Q Now sir in your observations of Mr. Puglio and Mr.
9 DeLorenzo, was the BelAir Men's Shop being used to
10 take bets, was that a place where bets were made?

11 A Yes, sir.

12 Q And did you see Mr. DeLorenzo take bets in the
13 BelAir Men's Shop as well as Mr. Puglio?

14 A No, not that I recall.

15 Q You saw Mr. Puglio take bets in the BelAir Men's
16 Shop, correct?

17 A Not that I recall.

18 Q Well, you did see Mr. DeLorenzo return to the Shop
19 with a paper bag in his possession?

20 MR. ETKIN: This is repetitive.

21 THE COURT: He did tell us that.

22 MR. LAWLER: That's all I have.

23 REDIRECT EXAMINATION BY MR. ETKIN:

24 Q You knew who Mr. Puglio was?

25 A Yes.

1 Q As an expert how much would you estimate he did
2 in business a day?

3 MR. LAWLER: Objection, Your Honor, that is
4 irrelevant.

5 THE COURT: I didn't hear the question.

6 MR. ETKIN: I asked him how much Mr. Puglio
7 did a day.

8 MR. LAWLER: Objection, Your Honor, it has
9 been established --

10 THE COURT: Overruled. Can you give us an
11 opinion?

12 THE WITNESS: No.

13 THE COURT: All right.

14 BY MR. ETKIN:

15 Q Can you give me an opinion how much Art Viscusi,
16 how much he did every day?

17 A My honest opinion would be more than \$200, not more
18 than \$500 a day.

19 Q Do you know that the Government is making certain
20 allegations here for payment of money against Mr.
21 DeLorenzo, payment of an excise tax?

22 MR. LAWLER: Objection, Your Honor, the Govern-
23 ment is the defendant, the plaintiff is making the
24 allegation.

25 BY MR. ETKIN:

1 Q I will rephrase the question. Are you familiar with
2 the fact that the Government has alleged that Mr.
3 DeLorenzo did a certain amount of business between
4 August 1 and October 4?

5 A I am not familiar with all the aspects of the case,
6 however, I did talk with the attorney for the
7 Government and he advised me something to that extent
8 today, this afternoon.

9 Q Did he tell you or did someone tell you that there
10 were certain allegations here that Mr. DeLorenzo
11 did \$2,000 worth of business or \$1900 worth of
12 business on the after-- on the day he was arrested?

13 MR. LAWLER: Objection.

14 THE COURT: Overruled.

15 THE WITNESS: No, sir.

16 THE COURT: You were never told?

17 BY MR. BIKIN:

18 Q You never heard that \$1900 or \$2,000 figure as the
19 total amount of slips charged to Mr. DeLorenzo?

20 A No, sir.

21 Q Did you hear back in the courtroom here when you
22 were sitting back there that that was the total
23 amount of the slips that were being charged to Mr.
24 DeLorenzo on the day he was arrested?

25 A I don't think that was said, counsel.

1 Q Well, you heard the investigator here say that Mr.
2 O'Hay's slips added up to \$1900 and some odd
3 dollars, didn't you?

4 A No.

5 Q The \$2,000 figure was a figure you happened to
6 pick based upon your own estimate?

7 A And my own observations during some 30 day period,
8 is that correct?

9 MR. LAWLER: That is not a proper characterization
10 tion of his testimony.

11 THE COURT: He can tell us, the witness. Did
12 you tell us that?

13 THE WITNESS: Bets, yes. On other occasions
14 I saw him picking up the paper bag.

15 BY MR. ETKIN:

16 Q Did you ever look in the paper bags?

17 A No.

18 Q It could have been coffee in the paper bag, isn't
19 that so?

20 MR. LAWLER: Objection, Your Honor.

21 BY MR. ETKIN:

22 Q Well, isn't it so?

23 THE COURT: Overruled.

24 THE WITNESS: I don't believe so.

25 BY MR. ETKIN:

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1 Q Well isn't -- well, how do you know that, did you
2 see anybody put anything in those paper bags?

3 A Yes, sir.

4 Q What did you see go into the paper bags?

5 A On one instance at Curley's Luncheonette on Broadway
6 Mr. DeCappio put some betting slips and money and
7 gave it to Mr. DeLorenzo. On another instance Emma
8 DeGiorra or something of that nature, I don't know
9 exactly how it is pronounced, at Emma's News room
10 on Broadway some slips and some money from the
11 cashregister was taken and put in a paper bag.

12 Q Was this the same paper bag?

13 A No.

14 Q Each operator had its own paper bag?

15 A Yes.

16 Q Same size paper bag?

17 A Approximately.

18 Q Did you ever see Mr. DeLorenzo leave his business
19 and get coffee in the morning or afternoon?

20 A No, sir, I don't think -- I don't know if he went.

21 Q You followed him around for 30 some days?

22 A Yes, sir.

23 Q Never saw him get coffee any of the places he
24 stopped at?

25 A No, sir.

1 Q Did you ever check his bank account?

2 A No, sir.

3 Q Did you ever check his net worth?

4 A No.

5 Q Do you know how much money he has?

6 A No, sir.

7 MR. LAWLER: Objection, Your Honor. This whole
8 line of questioning is irrelevant. A person who
9 accepts wagers doesn't necessarily mean he has income
10 --

11 MR. ETKIN: He is testifying as an expert,
12 that he knows how much business he did each and every
13 day.

14 THE COURT: I will allow it.

15 BY MR. ETKIN:

16 Q Did you know how much money was in the paper bags?

17 A No, sir.

18 Q Do you know how much the total wagers were that
19 Mr. DeLorenzo took every day?

20 MR. LAWLER: I object, the plaintiff has the
21 burden of showing that.

22 THE COURT: This goes to the things you brought
23 out. He said he handled \$2,000 a day.

24 MR. LAWLER: It is entirely irrelevant, the
25 amount of money he has in his bank account, sir.

1 THE COURT: I allow it.

2 BY MR. ETKIN:

3 Q Did you ever check the money that went into the
4 paper bags every day?

5 A I have no way of checking it.

6 Q You had no way of knowing how much money was in each
7 paper bag, did you?

8 A No.

9 Q In fact you don't have any knowledge personally of
10 what Mr. DeLorenzo did every day in the business, is
11 that so?

12 A No exact knowledge.

13 Q It is through your own speculation? Isn't that so?

14 A It is my opinion.

15 Q Based upon unfounded fact, isn't that so?

16 MR. LAWLER: Objection, Your Honor. His
17 testimony was to the facts based on --

18 THE COURT: Sustained. That is for me to
19 decide.

20 MR. ETKIN: I have no further questions.

21 MR. LAWLER: That's all.

22 (Witness excused.)

23 MR. ETKIN: Your Honor, I rest my case.

24 MR. LAWLER: Your Honor, at this point I make
25 a motion under Rule 41 of the Federal Rules that

1 the plaintiff's case be dismissed and judgment be
2 entered for the Government on the counterclaim.

3 In this regard Your Honor, I point out to the
4 Court, the Fifth Circuit case in Ginsberg where the
5 Court specifically said a plaintiff in a gambling
6 excise case has the burden not only of proving that
7 the Government's assessments are incorrect, but only
8 -- but also the correct amount of wagering excise
9 tax during the relevant period. Here we have a
10 case where the taxpayer admits he took bets every
11 day during the relevant period. The taxpayer has
12 an obligation to keep records during that period
13 for each day. Even -- the Ginsberg case, the Fifth
14 Circuit case, I cite in my brief. The Judge in his
15 opinion in the O'Neil case says the only way a
16 taxpayer can carry his burden of proof is to come
17 into this courtroom with sufficient records. Your
18 Honor, not one record, not one bit of documentary
19 evidence has been submitted to you by the plaintiff.
20 I submit as a matter of law plaintiff's case is
21 woefully lacking and judgment should be entered
22 according.

23 THE COURT: I will reserve decision.

24 MR. ETKIN: At this time I make a motion for
25 a direct verdict in our favor, entering judgment

1 against the defendant as requested in the petition
2 and claim of Mr. DeLorenzo.

3 I only want to make one comment about records,
4 documents and books, Your Honor. The records, docu-
5 ments and books were those records that we produced
6 in court and presented as evidence, those records
7 belonging to Mr. DeLorenzo with regard to those books
8 and records and documents that he had ownership of and
9 that he had control over. Based upon those documents
10 and that evidence that we presented here today I am
11 asking for a directed verdict.

12 THE COURT: I will reserve decision.

13 MR. LAWLER: As I recollect the testimony the
14 plaintiff sat on the stand and he said he was
15 arrested on October 4th, he had certain slips in
16 his possession, all of these slips related to the
17 day October 4. "The bets I took in the morning."
18 There has been not one shred of documentary evi-
19 dence submitted to this court by the plaintiffs,
20 not one shred, to show the correct tax liability
21 for the 55 days preceding October 4. That is the
22 point of the O'Neill case, that is the point of
23 the Ginsberg case.

24 THE COURT: I am not familiar with those
25 cases because I am a busy judge, we have a lot of

LETKO DIRECT

[125]

1 work to do here. You gave me your brief a couple
2 of days ago. I haven't read the O'Neill case or
3 the Ginsberg case. What I am going to do is reserve
4 decision and let you brief it.

5 MR. LAWLER: Thank you.

6 THE COURT: We don't have time. This is a
7 case should have been compromised I think, and
8 settled, and I will state it again for the record,
9 but it is up to the defendant now.

10 MR. LAWLER: Your Honor, at this time the
11 defense will call Mr. Peter Letko to the stand.

12 PETER LETKO
13 called as a witness on behalf of the Government
14 being first duly sworn was examined and testified
15 as follows:

16 DIRECT EXAMINATION BY MR. LAWLER:

17 Q Are you employed?

18 A Yes, sir.

19 Q Who is your current employer?

20 A Internal Revenue Service.

21 Q What is your present capacity?

22 A Internal Revenue Agent, excise tax.

23 Q How long have you been with the Internal Revenue
24 Service?

25 A Since 1948.

1 Q What was your capacity with the Internal Revenue
2 Service in 1967?

3 A In 1967, Internal Revenue Agent, excise tax.

4 Q Would you explain for Judge Foley what your duties
5 were in that capacity?

6 A An excise tax, there's numerous ones, truck manu-
7 facturers, wagering tax, diesel fuel, a whole mess
8 of them.

9 Q Sir, with respect to those duties did you in the
10 year '67 become involved with the taxpayers, the
11 plaintiff in this case, Frank DeLorenzo?

12 A Yes, sir.

13 Q Could you kindly explain how that involvement took
14 place?

15 A There was a raid in Schenectady by the State Police
16 on gambling and wagering, which is part of the
17 excise tax. I then contacted Senior Investigator
18 Tim O'Hay, or Tom O'Hay, and asked him "Can I come
19 down and look over the books and records that were
20 seized and betting slips that were seized during
21 the raid?"

22 Q How did you find out about the raid?

23 A In the newspapers.

24 Q You read about it?

25 A Yes.

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1 Q When did you contact Investigator O'Hay?

2 A That I can't give you the definite date.

3 Q Was it in the year '67?

4 A Yes.

5 Q Did you subsequently go down to the State Police?

6 A Yes, Troop G barracks.

7 Q Who did you see down there?

8 A Investigator O'Hay.

9 Q And what happened, what did you do?

10 A I asked for the records and he took me in the back
11 room where the BCI is and I asked for the records
12 and he brought them over to me and he brought me
13 the betting records of DeLorenzo, the ones that
14 were seized at the BelAir Men's Shop, all the
15 records concerning that raid, and he says "They all
16 belong to Mr. DeLorenzo."

17 Q Sir, with respect to those records, what did you do
18 then?

19 A I took my work papers out and started adding up the
20 bets on the sheet, the policy bets, the baseball
21 bets.

22 (A document marked Defendant's Exhibit D for
23 identification.)

24 Q Sir, I am going to show you what has been marked
25 Defendant's Exhibit D and I ask you if you

1 recognize that document?

2 A Yes, sir, these are my work papers on the case.

3 Q Looking at Defendant's Exhibit D could you tell me
4 how did you go about preparing this exhibit, what
5 did you do?

6 A I did -- I took the individual slip and added them
7 up and put the totals on the sheet.

8 Q What slips did you add up, the slips that were
9 given to you by Investigator O'Hay?

10 A Yes.

11 Q Call your attention to page 4 -- first of all,
12 page 4, entitled Frank A. DeLorenzo, now how did
13 you go about computing these slips, what slips are
14 these first of all?

15 A These are my number of days computation, the period
16 August, September, October, there were 27 days not
17 counting Sundays and -- Sundays in August, 26 in
18 September and three in October, and the total wagers
19 on the prior sheet total \$1996.72, for -- so for
20 27 days it was \$53,910 --

21 Q --Let me interrupt you sir, there was a total of
22 56 days you computed tax liability for the plaintiff,
23 correct?

24 A Yes.

25 Q How did you arrive at that total of 56 days?

1 A There's 27 days not counting Sundays in August,
2 25 in September and three in October.

3 Q Why did you choose the month of August and
4 September and October?

5 A When I spoke to Investigator O'Hay he told me Mr.
6 DeLorenzo was under surveillance for two months.

7 MR. ETXIN: I object to any testimony of
8 what anybody else told him, Your Honor.

9 MR. LAWLER: Your Honor, this is being
10 offered not for the truth of what was told, it is
11 being offered to show what this agent relied on.

12 THE COURT: Overruled.

13 BY MR. LAWLER:

14 Q So you determined that there was a tax liability
15 for 56 days, is that correct?

16 A Yes, sir.

17 Q Is it fair to say they would be for all days Monday
18 through Saturdays, except Sunday?

19 A Yes.

20 Q During the period August 1 to October 47

21 A Yes.

22 Q I call your attention to the second page, the
23 page directly -- I think it is page 2, where various
24 items are listed sir.

25 A Yes.

1 Q Now could you tell us how it is you came to record
2 these bets, what slips these slips represent?

3 A Well, these were the slips that were given to me
4 by the State Police Investigator which were in
5 the BelAir Shop, Puglio and BelAir Shop.

6 Q My question is this, who gave you the slips of
7 paper representing these slips, Investigator O'Hay?

8 A Yes, they were in envelopes.

9 Q What did he tell you the slips represented?

10 A Oh, this number 2 was from Alfred Puglio who was
11 arrested, and these were taken from the BelAir
12 Man's Shop.

13 Q How many slips were taken from the BelAir Man's
14 Shop?

15 A There are 45 slips of paper containing 109 horse
16 bets, 39 slips of paper --

17 THE COURT: I think he should make --

18 THE WITNESS: -- It is marked up at the top.

19 THE COURT: All right.

20 BY MR. LAWLER:

21 Q Once again will you go through and tell us the
22 slips that were seized from the BelAir Man's Shop,
23 how many they were and what gambling activities
24 they represented?

25 A It says --

1 MR. ETHIN: Your Honor, just so we are all
2 clear, if -- is he going to break it down as to
3 what was seized from Mr. DeLorenzo's person and
4 what was seized from the Del Air Men's Shop so we
5 know which was which?

6 THE COURT: Well, he should try.

7 MR. LAWLER: He is going to.

8 THE WITNESS: On page 2, these were seized as
9 I said from the shop and there were 45 slips of
10 paper containing 109 horse bets, 30 slips of paper
11 containing 1663 policy bets and there was I don't
12 know how many baseball bets were in it.

13 Q There were slips evidencing horse bets?

14 A Right.

15 Q These were seized from the Delair Men's Shop. Now
16 sir it seems to me you have 163 policy bets but
17 there are not 163 entries evidenced for policy
18 bets, could you explain to the court what -- why
19 that is?

20 A There's 1663 policy bets. I totalled the slips
21 and every 9 or 10 bets on a slip, I totalled the
22 slips and put the totals down.

23 Q You added them up?

24 A Yes.

25 Q Because the bets on policy would be small in

1 number, nickel, dime and quarter?

2 A One dollar, \$1.25, \$.10.

3 Q Is that the same for the horse bets too?

4 A Yes, that would be \$2.00 daily double or \$10 slips.

5 Q I direct your attention to page 3.

6 A These were the slips that were actually given to
7 me from Frank DeLorenzo.

8 Q These were the slips that Investigator O'Hay said
9 were seized from DeLorenzo's person?

10 A Right, and 84 horse bets totalling \$366.50 and
11 292 policy bets which totalled \$68.25.

12 Q Sir, you have on the bottom of page 3 an indication
13 "Alfred Puglio and Frank DeLorenzo totalled together".

14 A Yes, Mr. O'Hay told me at the time he was seized
15 they said Mr. DeLorenzo had \$274 cash in his
16 pocket.

17 Q Now then sir, with this in mind you determined
18 -- well, did you determine Mr. DeLorenzo had --

19 MR. ETKIN: Your Honor, I don't like to
20 interrupt, but for the sake of saving confusion
21 you said number 3 were bets that were in Mr.
22 DeLorenzo's possession?

23 MR. LAWLER: No, sir.

24 (Discussion held off the record.)

25 THE COURT: I don't know, these pages, the

1 copy I have is cut off, I don't know which pages
2 were cut off, maybe you can mark all these pages.

3 MR. LAWLER: That would be fine with me,
4 Your Honor.

5 THE COURT: We have a lot in the record now.

6 THE WITNESS: Page 3, schedule 1-a --

7 MR. LAWLER: For the sake of clarity, we could
8 mark the pages -- the page following the first page
9 we could mark this page one and so forth. The
10 page we were just discussing was page 3.

11 MR. ETKIN: The page you were discussing was
12 page four.

13 MR. LAWLER: I am sorry, it was page 4.

14 THE COURT: I think you had better leave it
15 alone. He is talking about the pages that are
16 marked on the top.

17 MR. LAWLER: We will leave it alone.

18 THE COURT: Page 3 is not in the exact order.
19 You think that page 3 might be in --

20 THE WITNESS: Well, on work papers we never
21 mark the page on it and we just make a listing.

22 THE COURT: I am not criticizing your job,
23 it is a matter of us keeping straight what is in
24 this record if somebody starts looking for a page.

25 BY MR. LAWLER:

1 Q Now sir, after you tabulated the amount of money
2 as evidenced by the slips seized from the Men's
3 Shop and for Mr. DeLorenzo, you got one sum of
4 money, is that correct?

5 A Yes. That would be on page one.

6 Q Now turning to page one, which is the page follow-
7 ing the recap of work papers, now then, what does
8 the figure on the left indicate?

9 A 365, and then these were the policy bets and the
10 horse bets and the baseball.

11 Q And the grand total of bets accepted were \$1996.72,
12 correct?

13 A Yes.

14 Q Now sir, there was a tax of 10% on wagers?

15 A On gross.

16 Q How did you arrive at Mr. DeLorenzo's tax liability?

17 A I multiplied the \$1996 times 10%.

18 Q Did you arrive at Mr. DeLorenzo's tax liability for
19 the entire 56 day period?

20 A O.K. Three days I multiplied three days times
21 \$199.67, \$599.01 in tax on September 6th, the days
22 times \$199.67 for \$5,191.42, and August 27 --
23 August, 27 days times \$199.67 for \$5,391.09, the
24 total is \$11,191.52.

25 MR. LAWLER: At this time I would offer the

DETRO CROSS

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1 work papers in evidence.

2 MR. ETKIN: I object, Your Honor, on the
3 ground that a great deal of the information based
4 upon this record is being offered in evidence
5 which is based on hearsay information.

6 THE COURT: Overruled. I will receive it.

7 MR. LAWLER: Thank you.

8 (Defendant's Exhibit B marked in evidence.)

9 BY MR. LAWLER:

10 Q How much time did you take in working those work
11 papers?

12 A Altogether with my report 17 hours.

13 Q When you were done with those slips of paper, what
14 did you do with them, did you keep them yourself?

15 A No, I have -- I gave them back to Investigator
16 O'Hay.

17 Q That is the first and last time you saw them?

18 A Yes.

19 Q Until today?

20 A Yes.

21 MR. LAWLER: That's all I have.

22 CROSS EXAMINATION BY MR. ETKIN:

23 Q Of course you weren't involved in this raid at
24 all?

25 A No, sir.

1 Q The arrest, the surveillance?

2 A No, sir.

3 Q You had no knowledge of the surveillance?

4 A No, sir.

5 Q How did you come to the figure of 56 days?

6 A The State Police told me he was under observation
7 for two months.

8 Q Did the State Police do this by an affidavit, did
9 they do it in writing?

10 A No.

11 Q In other words somebody from the State Police came
12 to you and said that "We had this man under sur-
13 veillance for 56 days," and that is what you base
14 your total information on?

15 A Yes, sir.

16 Q Did you show you any wiretaps or any other type
17 of information, subpoenas or anything at all?

18 A No, I believe there were no wiretaps because I
19 asked the investigator.

20 Q Did they show you any search warrants or anything
21 else?

22 A I didn't ask for that, I asked for the betting
23 slips.

24 Q It was totally based upon what an officer told you,
25 he was under surveillance?

1 A Yes.

2 Q Did you do anything to make your own independent
3 survey as to the total number of days that the
4 gentleman, Mr. DeLorenzo, was under surveillance?

5 A No, sir.

6 Q And if the State Police had told you that he was
7 under surveillance for 30 days, you would have
8 used 30 days in your calculations?

9 A Yes.

10 Q Or if they said five days?

11 A Yes.

12 Q Or if they told you it was 200 days you would have
13 used 200?

14 A Yes.

15 Q You heard one of the gentlemen say here between
16 August 1, 1967 and October 4 Mr. DeLorenzo was not
17 under surveillance each and every one of those days
18 isn't that so?

19 A I heard him say that.

20 Q He said it was at least one-third less than 56
21 days.

22 A During the months he was under surveillance.

23 Q But he said that he wasn't under surveillance each
24 and every day during that period of time.

25 A Yes, he said that.

1 Q If you knew that at that particular time, would
2 you have used a different figure in your calculations?
3

4 A No, not only that but in January I wrote Mr.
5 DeLorenzo a letter to come in with his books and
6 records.

7 Q In your original calculations if you thought it
8 was only 30 days you would have --

9 A --If they told me 30 days I would have used that,
10 yes, sir.

11 Q You went to the State Police and you asked for
12 these betting slips, is that correct?

13 A Yes.

14 Q And I am assuming that they allocated where the
15 slips were taken from, where they picked up from,
16 correct?

17 A Yes.

18 Q You didn't have any information on what was on
19 Mr. DeLorenzo or what was --

20 A -- The only thing is the envelopes they gave me
21 denote Mr. DeLorenzo, which I had on separate
22 work papers.

23 Q So they did give you separate envelopes?

24 A Right.

25 Q And they did have the wagers that were taken from

1 Mr.DeLorenzo's possession and the wagers that were
2 taken from the BelAir Men's Shop segregated, is
3 that correct?

4 A Yes, sir.

5 Q And you went through those envelopes, and based
6 upon those envelopes you came to a determination,
7 is that correct?

8 A Yes, sir.

9 Q I refer you to what I think is page 3 -- I am
10 referring you to the page, excuse me, page 2, so
11 that we know what we are talking about, we are
12 talking about the same thing, I am referring to
13 the page that has way up on the top in small
14 letters "Frank A. DeLorenzo" and then on the line
15 it has Alfred Amelio Puglio alias Al Collins, all
16 with bets; do you have that page?

17 A Yes.

18 Q Then under that it says "45 slips containing 109
19 horse bets, 30 slips containing 1600 -- 1683 policy
20 bets, all on October 4, '67, is that correct?

21 A Yes.

22 Q How did Mr. Puglio's name get up on the top of
23 this sheet?

24 A Well, Mr. O'Hay, Investigator O'Hay told me Alfred
25 Puglio was an employee of the BelAir Men's Shop

1 and all these should be combined together.

2 Q Did you ever make a claim against Puglio?

3 A No.

4 MR. LAWLER: Objection, that is irrelevant.

5 THE COURT: Overruled.

6 BY MR. ETKIN:

7 Q Never made a claim against him at all?

8 A No.

9 Q Never charged him with any of these?

10 A No, because I took the investigator's thing that
11 they were all Mr. DeLorenzo's.

12 Q You just took the investigator's word, correct?

13 A Yes.

14 Q Never made your own independent investigation?

15 A In what manner?

16 Q You never went out in any manner to find out
17 whether these were Mr. DeLorenzo's wagers other
18 than what the officer said to you?

19 A Right.

20 Q How did you happen to originally to get Mr. Puglio's
21 name up there before you talked to Mr. O'Hay?

22 A This is from the work papers, from the State
23 Police.

24 Q He gave these sheets right here, these sheets are
25 from the State Police?

1 A Right.

2 Q You didn't do this yourself?

3 A Oh, no, these are the ones the State Police had.

4 Q I was under the impression everything in here
5 was your calculations.

6 A The figures written down here are my calculations
7 from these betting slips.

8 Q But how about who the bets are to be charged to,
9 charged against, is that the State Police's?

10 A Yes.

11 Q They charge them against certain individuals or
12 places, correct?

13 A Yes, charged them against who --

14 THE COURT: You are on page 2, I have that.
15 Did you make out that work sheet?

16 THE WITNESS: I made out this work sheet.

17 THE COURT: The whole thing?

18 THE WITNESS: Yes, sir.

19 THE COURT: You wrote out the top, the names
20 on it?

21 THE WITNESS: Yes, sir.

22 THE COURT: WHERE did you get the information?

23 THE WITNESS: State Police.

24 THE COURT: All right, but it is your writing.

25 THE WITNESS: Yes.

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1 BY MR. ETKIN:

2 Q And on the sheet where you have got Mr. Puglio's
3 name, you have got a total of approximately --
4 you have got \$518 in horse bets, \$802 in baseball
5 pool, \$210 in policy bets which must total about
6 \$1700 and some odd dollars, correct?

7 A I don't know.

8 Q Well, five and eight is thirteen and another 200
9 is 17, that is pretty easy, that is charged on this
10 sheet where Mr. Puglio's name is.

11 A These were things that were also secured in the
12 BelAir Men's Shop.

13 Q But they are on a sheet with Mr. Puglio's name on
14 it, isn't that true?

15 A Well, this sheet, yes.

16 Q No question about that, is there?

17 A No.

18 Q Now we turn the sheet over to the next page we go
19 to Mr. DeLorenzo and you have got Frank A. DeLorenzo.
20 Now on Frank A. DeLorenzo's sheet you have got
21 horse bets or horse sheet \$366.50, policy for
22 \$68.25, which totals \$424.75.

23 A Yes, these were the ones seized on Mr. DeLorenzo.

24 Q On Mr. DeLorenzo, there weren't any baseball bets
25 here at all, were there?

1 A No.

2 Q And you totalled the other bets under Mr. DeLorenzo
3 and credit them to him because the State Police
4 told you to do that?

5 A Yes, sir.

6 Q That wasn't anything you determined on your own?

7 A Because I wasn't in on the raid, I didn't know
8 what slips were seized or what.

9 Q Somebody comes to you and just tells you to charge
10 something to somebody with a certain tax, you just
11 go ahead and charge them with a certain tax?

12 A If you come up --

13 MR. LAWLER: Objection, Your Honor.

14 THE COURT: Well, let him tell us what he did
15 here.

16 BY MR. ETKIN:

17 Q I will withdraw the question, it is obvious what
18 was done here. Sometimes even the taxpayer deserves
19 a break --

20 MR. LAWLER: Objection, I resent the charac-
21 terization.

22 THE COURT: There is no jury here.

23 MR. LAWLER: Well, still I think it warrants
24 an objection.

25 BY MR. ETKIN:

1 Q So you arrived at the calculation of \$111,158.26
2 by taking all of the bets, the total amount of
3 bets from the BelAir Men's Shop, the total amount
4 of bets that you had on Mr. Puglio's sheet --

5 MR. LAWLER: Objection, Your Honor, there has
6 been no evidence at all that Mr. Puglio had any
7 bets on his person, as I recall the testimony.

8 THE COURT: I will listen.

9 MR. LAWLER: I just wanted to make that clear
10 for the record.

11 BY MR. ETKIN:

12 Q You took all the wagers that were on Mr. Puglio's
13 sheet, MR. DeLorenzo's sheet and added them up
14 and charged them to Mr. DeLorenzo and said Mr.
15 DeLorenzo was doing \$111,815.26, is that correct?

16 A Yes.

17 Q Based upon that you are charging him and assessing
18 him a tax?

19 A Yes.

20 Q Did you know Mr. Puglio was arrested for possession
21 of gambling slips?

22 A I probably did, yes.

23 Q Did you know he was on the premises of the Bel
24 Air Men's Shop at the time of the raid?

25 A I don't recall.

1 Q You know that he was the only one on the premises
2 at the time of the raid?

3 A I just found out today.

4 Q Do you know that he pleaded guilty to possession
5 of policy, betting slips?

6 MR. LAWLER: It is irrelevant what Mr. --

7 THE COURT: Overruled.

8 BY MR. ETKIN:

9 Q Did you ever call Mr. Puglio in?

10 A No.

11 MR. LAWLER: Objection, Your Honor. That is
12 irrelevant.

13 THE COURT: Overruled.

14 BY MR. ETKIN:

15 Q Did you ever call Mr. Puglio in or write him a
16 letter to ask him whether any of the slips were
17 his?

18 A No, sir.

19 Q Here he admitted in court they were his slips --

20 MR. LAWLER: Objection, Your Honor.

21 THE COURT: Sustained. The record speaks for
22 itself.

23 BY MR. ETKIN:

24 Q Did you tell the State Police at the time you
25 picked up all the slips the purpose for which you

1 were asking for the slips?

2 A Told Investigator O'Hay, yes, sir.

3 Q When you gave it back to them, you gave the slips
4 back to them, did you tell them that you were
5 making a claim?

6 A I don't recall.

7 Q They knew you were interested in making a claim
8 for taxes?

9 A Yes, sir.

10 Q And even with this claim you heard them say they
11 burned the slips knowing you were making a claim?

12 MR. LAWLER: What the State Police did with
13 the slips has no bearing.

14 BY MR. ETKIN:

15 Q Did you know they were going to burn these slips
16 or destroy them?

17 A No.

18 Q I am sure you didn't have any knowledge of that?

19 A No.

20 Q I am not trying to put the blame on you, I am
21 trying to figure the whole thing out, it is
22 unusual when a claim is being made against somebody
23 by some Federal agency that certain bits of
24 evidence are destroyed.

25 MR. LAWLER: I strenuously object to that.

1 THE COURT: All right, just object, you don't
2 have to explain your objection. We are going over
3 the same thing.

4 MR. ETKIN: I have no further questions.

5 THE COURT: Do you have any more questions,
6 Mr. Lawler?

7 MR. LAWLER: One short one, Your Honor.

8 REDIRECT EXAMINATION BY MR. LAWLER:

9 Q The slips represented on the work papers attributed
10 to Alfred Puglio, those are the slips that are
11 -- were seized from the BelAir Men's Shop?

12 A Yes, sir.

13 Q Those are not the slips that were on Puglio's
14 person according to what Investigator O'Hay told
15 you?

16 A Right.

17 THE COURT: All right, Inspector, did you do
18 this very often? Because this excise wagering
19 tax computation against gamblers --

20 THE WITNESS: Yes.

21 THE COURT: Have you got any idea how much you
22 have recouped?

23 THE WITNESS: No, I don't, I wouldn't have
24 any knowledge.

25 THE COURT: Did you ever follow through?

1 THE WITNESS: I can't follow through on them.

2 THE COURT: You have no idea?

3 THE WITNESS: No, because when we set the
4 assessments up, if the taxpayer pays it goes to
5 Andover, if he doesn't pay the revenue officers
6 go out and the agents have no record of what is
7 paid.

8 THE COURT: I mean for our area here, we used
9 to have to try these cases and then the law was
10 found unconstitutional, then we got the safe
11 streets and crime control act and that was a new
12 thing, as you know. I wondered if you ever follow-
13 ed through.

14 THE WITNESS: We can't keep statistics on the
15 thing. We are not allowed to.

16 THE COURT: You have no judgment at all?

17 THE WITNESS: No, as soon as the thing is
18 through, whatever we have goes in, or the work
19 papers --

20 THE COURT: Do you have anything to do with
21 settlements or compromises?

22 THE WITNESS: No, sir.

23 THE COURT: What if you wanted nine and they
24 offered eight, would you give it consideration in
25 this type of case?

1 THE WITNESS: If you have a record or something
2 to show that that is what it would be, and I said
3 I wrote for records to Mr. DeLorenzo, he never
4 showed up, his accountant --

5 THE COURT: I saw your letter.

6 THE WITNESS: He never showed up.

7 THE COURT: All right.

8 MR. ETKIN: I would like to ask him one
9 questions.

10 RECROSS EXAMINATION BY MR. ETKIN:

11 Q Mr. DeLorenzo did have an accountant, didn't he?

12 A In the letter he sent Mr. Parisi or something.

13 Q Mr. Parisi represented him?

14 A Yes. In a note on one of my letters --

15 Q I think you have got on your notes first -- you have
16 on your notes right here in this packet in back
17 that Mr. Parisi did not show up.

18 A Yes.

19 Q At least you have 1/24/68?

20 A Yes.

21 Q He did have an accountant at the time?

22 A Yes.

23 THE COURT: You think he did have somebody,
24 Parisi?

25 THE WITNESS: It is a long time ago. In my

1 April 19 letter "Neither you nor Mr. Parisi kept
2 the appointment" so he have retained Mr. Parisi.

3 THE COURT: All right, he thinks he did re-
4 tain Mr. Parisi. There is a letter that signifies
5 that there. So is that all we have?

6 MR. ETKIN: Yes, that's all.

7 (Witness excused.)

8 MR. LAWLER: Your Honor, the only other thing
9 I have is I would like to introduce into evidence
10 answers to interrogatories propounded to the
11 plaintiff by the defendant.

12 THE COURT: Well, ordinarily they are part of
13 the pleadings.

14 MR. LAWLER: If they are, that is fine.

15 THE COURT: How many answers do you have?

16 MR. LAWLER: There are two sets, Your Honor,
17 they are not voluminous, I assume you have no
18 objection --

19 MR. ETKIN: I have no objection, they are part
20 of the pleadings.

21 THE COURT: Are those copies?

22 MR. LAWLER: These are the originals I
23 believe.

24 MR. ETKIN: I have no objection to you giving
25 them to the judge.

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THE COURT: You should make it part of the file. The originals ordinarily should be filed.

MR. LAWLER: I know, Your Honor.

THE COURT: File them, and we will mark them.

MR. LAWLER: I would rather have them marked to be sure.

THE COURT: You mean as an exhibit?

MR. LAWLER: Yes.

THE COURT: All right.

MR. LAWLER: Your HOnor, I would offer into evidence Defendant's Exhibit A, and once again I would offer into evidence Defendant's Exhibit B, and once again I would renew my offer to put in Investigator Gasbara's affidavit for these search warrant which I believe is Defendant's Exhibit C.

THE COURT: I don't know, did I make a ruling on A? What did I rule?

MR. LAWLER: I don't believe you did make any ruling on A.

THE COURT: Anything I said I reserved decision on I will reserve decision on.

MR. LAWLER: All right, I wanted to renew my motion.

THE COURT: And B, decision is reserved, I will reserve decision.

1 MR. LAWLER: A is the certified copy of the
2 guilty plea.

3 THE COURT: Well, I don't know --

4 MR. ETKIN: I have no objection.

5 THE COURT: I will receive it.

6 (Exhibit previously marked Defendant's A
7 for identification marked in evidence.)

8 MR. LAWLER: That leaves us with B and C.
9 Once again I am offering C which is the affidavit
10 because --

11 THE COURT: No, I sustained the objection to
12 that.

13 MR. LAWLER: Well, I renew my objection -- my
14 offer of B.

15 MR. ETKIN: That is the one you reserved decision
16 on and that is the one I would object to.

17 THE COURT: D I received in evidence, that is
18 the work papers.

19 MR. LAWLER: Defendant's Exhibit E are answers
20 to interrogatories purpounded to plaintiff.

21 THE COURT: All right, I will receive that,
22 there is no objection to that anyway, part of the
23 pleadings.

24 MR. LAWLER: And Defendant's Exhibit F I once
25 -- they are interrogatories purpounded to plaintiff.

1 THE COURT: Both received.

2 (Defendant's Exhibits E and F marked in
3 evidence.)

4 MR. LAWLER: That's all I have, Your Honor.
5 The Defendant rests.

6 THE COURT: Any rebuttal?

7 MR. ETKIN: No rebuttal.

8 THE COURT: All right, so the evidence is
9 closed. I will take your motions again.

10 MR. LAWLER: Once again I renew my motion,
11 I think this taxpayer like all other taxpayers in
12 gambling cases has an obligation to keep records,
13 he has an obligation to come into court in the
14 event that he is assessed the tax and to prove
15 that the assessment as alleged by the defendant
16 is not only incorrect, but he has an obligation to
17 prove his correct tax liability for the entire
18 period.

19 Based on the testimony presented here, I
20 cannot see how this court could arrive at what
21 is this taxpayer's correct tax liability.

22 THE COURT: That is a brave statement.

23 MR. LAWLER: Your Honor, I do feel he has
24 a legal obligation to keep records. He hasn't
25 presented any records to the court.

1 THE COURT: I reserve decision. It is my
2 usual custom in court cases to reserve decision
3 throughout and then I will take your briefing.

4 MR. LAWLER: I understand that.

5 MR. ETKIN: Your Honor-- I renew my motion
6 for a directed verdict based on the same grounds
7 as my original motion.

8 THE COURT: So I will reserve decision on
9 the motions, and I wonder now, are you going to
10 have the record transcribed?

11 MR. ETKIN: It is not necessary for me. I
12 just wanted to know whether you are going to give
13 us a change to sum up?

14 THE COURT: No, I would rather have your
15 briefing.

16 MR. ETKIN: I just wanted to point out one
17 or two things on the record with regard first of
18 all to the offer we made. We made the offer in
19 good faith based upon negotiations because my
20 client did not want to go through the ordeal, of
21 course and the time consuming situation that is
22 involved with the trial, and I just want to state
23 that the offer is no admission on our part of
24 either the amount of money owed or the interest
25 owed in relation to the entire matter.

1 THE COURT: Of course not, offers in compro-
2 mise, I won't hold the Government lawyer either
3 to his position that he would take \$9,000 and you
4 offered \$8,000, except I do think, and I am very
5 frank to say, the Second Circuit can read it and
6 the United States Supreme Court, and we had a trial
7 here that I thought was unnecessary. When you get
8 into a range of \$1,000 difference -- I have been
9 around a long time settling cases, and I think this
10 one should have been settled.

11 MR. ETKIN: And I just wanted to say in regard
12 to my position that I think even a taxpayer these
13 days, back in '67, has certain rights, and taking
14 into consideration Mr. Lawler's statement in regard
15 to the law and in relation to this -- relationship
16 to this matter, when individuals get on the witness
17 stand and say that they took somebody else's words
18 for what happened, this whole situation, the reason
19 we are here in court is based upon assumption and
20 speculations. I don't blame the taxpayer, this
21 particular matter or any other matter in which this
22 method is used, I wish I were eloquent to put into
23 words.

24 THE COURT: You can put it in your brief.

25 MR. ETKIN: The way I feel about this entire

1 matter.

2 MR. LAWLER: Taxpayers have rights, they also
3 have duties. One of the statutory duties is to
4 keep records.

5 THE COURT: All right, that is your point, I
6 will weight it and think about it and forget about
7 the negotiations, and I think it is important, I
8 am going to stand on it, the negotiations when it
9 reaches this point in this type of court case
10 things should have been worked out and I am dis-
11 appointed, it should have been worked out.

12 MR. LAWLER: Once again we have to take a
13 look at the law --

14 THE COURT: I also take a look at the law.
15 If I have to decide it, I will decide it legally
16 and fairly. I think you should order the trans-
17 cript. Are you going to order the transcript?
18 Do you want it for your briefing?

19 MR. LAWLER: Does the plaintiff want the
20 transcript?

21 MR. ETKIN: I think, Your Honor, I am going
22 to rely on your notes and your memory. I don't
23 see any reason why I would need the transcript.

24 THE COURT: It is a matter for judgment, it
25 is also a matter for the Government's judgment.

1 I am not ordering you but on occasion the Government
2 does order the transcript and I found it helpful
3 particularly in tax cases.

4 MR. LAWLER: I will order the transcript judge.

5 THE COURT: And I don't know, how much time
6 do you want to brief it, file an exchange brief?

7 MR. LAWLER: Your Honor, would it be simultan-
8 eous?

9 THE COURT: It will be as far as filing and
10 exchanging, but I don't know how much-time you want.

11 MR. LAWLER: I don't care, I could do mine
12 fairly quickly, depending on when we get the
13 transcript.

14 Two weeks after that, or a week?

15 THE COURT: Mr. Etkin, you had that brief
16 handed to you today, I didn't know whether you
17 wanted time, but I want the briefing here within
18 a certain period of time.

19 MR. ETKIN: Whenever you say, Your Honor, I
20 will have it within that period of time. If you
21 want us to wait until we get the transcript and
22 have it to you two weeks after the transcript, that
23 is fine with me.

24 MR. LAWLER: I would only order the transcript
25 for the purpose of writing my brief.

1 THE COURT: I will allow each side two weeks
2 to file and exchange briefs after the transcript
3 is furnished to them, and one week to file reply
4 briefs if you feel it is necessary.

5 You can let me know, but I also want from
6 both of you proposed findings of fact and conclusions
7 of law to be submitted when the briefs are filed.
8 Those briefs and those proposed findings and con-
9 clusions are to be filed in duplicate with the
10 Clerk of the Court at Albany, and the Clerk will
11 then give me the copies to work with.

12 So is that clear to you?

13 MR. ETKIN: That is to go with our memorandum
14 of law?

15 THE COURT: When you file your briefs, pro-
16 posed findings and conclusions should be filed.
17 The evidence as you think it developed, the con-
18 clusions and I will decide which ones I think are
19 favorable to my state of mind.

20 MR. ETKIN: Fine, Your Honor. Thank you
21 very much for your time, we certainly appreciate
22 it.

23 MR. LAWLER: Thank you, Your Honor.
24
25

1 This is to certify that the foregoing record is
2 a true and accurate transcript of the proceedings
3 had at the time and place noted in the heading
4 hereof.
5

6 *Martin L. Miller*
7 MARTIN L. MILLER
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WITNESSES

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>R.D.</u>	<u>R.C.</u>
Frank A. DeLorenzo	13	34		
John W. Greagan	57		49	
James A Gasbara	95		116	
PETER LETKO	125	135	147	149

EXHIBITS - Plaintiff

<u>NUMBER</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
1	21	
2	27	27
3	64	
3-a, 3-b	70	
4		

EXHIBITS - Defendant

A	47	152==
B	84	
C	108	
D	127	
E	153	153
F		153

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANK A. DeLORENZO,

Plaintiff,

-against-

71-CV-290

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES:

OF COUNSEL:

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THOMAS M. LAWLER, Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

This action was brought by plaintiff to recover monies on what is alleged to be an erroneous assessment of excise taxes based on admitted wagering activities by plaintiff. A counter-claim has been interposed in defendant's answer, demanding full payment of the assessment made by the Commissioner of Internal Revenue and claiming that the assessment was not erroneous. There is jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§ 1240 and 1346(a)(1).

This action was tried to the Court on May 21, 1975. Decision was reserved on the motion by the defendant pursuant to Fed. R. Civ. P. 41 to dismiss the complaint and enter judgment for the government in the amount claimed to be due and owing in its counter-claim. There was also reservation of decision on the motion by the plaintiff for a directed verdict.

The factual origin of this litigation dates back almost a decade, to the period August 1 to September 26, 1967, at which time surveillance of plaintiff by the New York State Police in the City of Schenectady was conducted on the suspicion that he was engaged in wagering activities or bookmaking. Plaintiff was arrested on October 4, 1967, on criminal charges of gambling along with two other persons, one of whom was plaintiff's employee at his BelAir Men's Shop.

At the time of his arrest on October 4, 1967, the New York State Police searched both plaintiff's person and plaintiff's store and found \$284.00 in cash and betting slips on his person and \$1,712.72 and betting slips in a desk at the BelAir Men's Shop which the plaintiff operated. (R. 18, 38-40, 50-51, 76-77; Pl. Exh. #1).

The fact of the raid and arrest was published in the local newspaper and was noticed by Internal Revenue Agent Letko. According to the evidence, Agent Letko commenced an investigation of plaintiff which consisted mainly of going down to the state police barracks to examine the records of the arrest. From these records and information verbally communicated to Agent Letko, he calculated plaintiff's excise tax using the total amount of wagering monies seized from both plaintiff's person and the desk of his store at the time of his arrest as the typical receipts for one day's gambling activity (\$1,996.72). To this figure the Internal Revenue Agent testified he multiplied the number of days upon which the police observed the plaintiff's gambling activities to have taken place to determine the gross income from gambling. It is this factor of the number of days which to my mind is the primary issues before the Court.

At the trial, plaintiff called State Police Investigator Gasbara as his witness as well as testifying himself. Investigator Gasbara was responsible for conducting surveillance of plaintiff during the

time in question. Plaintiff also called State Police Investigator Greagan, who executed the search warrant against plaintiff. Agent Letko was the only government witness. Neither the facts or the law in this case is in any serious dispute. The plaintiff admits his gambling activities and merely claims that the Internal Revenue Service has, by its own formula as given, incorrectly and excessively levied excise taxes upon plaintiff. The IRS claimed a total assessment of \$14,734.92 (See Answer, Counterclaim: ¶ 3), but abated the penalties on the principal excise tax in the amount of \$2,795.37, and acknowledges that plaintiff has already paid \$1,192.66 (See Trial Brief for the Defendant, P. 1 [filed May 20, 1975]); this leaves \$10,746.89 alleged to be due and owing to the government and this is the amount demanded in defendant's counterclaim. [N.B. There seems to be arithmetic inconsistencies among defendant's various papers. However these figures do not enter into the formula used to arrive at the judgment herein]. The plaintiff asserts and as proven by the evidence that the total assessment should have been \$1,204.25, instead of the government's final figure of \$11,991.62, and with credit for the \$1,192.66 payment, the plaintiff owes the government the small amount of \$11.59.

The law, which both sides agree applies to the instant case, is that it is the taxpayer's burden to make a two-fold showing that: (1) the assessment made by the IRS is in fact excessive and (2) there is persuasive evidence that supports his estimate of the correct tax liability. A single mode of proof may answer both issues because:

[f]requently, if not quite generally, evidence adequate to overthrow the commissioner's finding is also sufficient to show the correct amount, if any, that is due.

Helvering v. Taylor, 293 U.S. 507, 515 (1935).

After hearing and observing the witnesses, it is my finding that there was an apparent misunderstanding or misinformation given to Agent Letko during his investigation of plaintiff's tax liability in terms of the number of days plaintiff was actually under surveil-

lance by the state police. Agent Letko, I find, relied in good faith upon this information, but nevertheless the mistaken reliance demonstrates that an excessive amount of tax was assessed and the evidence in regard to actual surveillance days indicates, in my judgment, the correct amount that should be assessed against and collected from plaintiff. *Helvering v. Taylor*, supra.

Agent Letko testified that he was verbally informed by unidentified state police officers that plaintiff was under surveillance for the period August 1 to September 26, 1967, with the arrest occurring on October 4, 1967. It is unclear in the record whether he also assumed or was specifically told that this surveillance was continuous except for Sundays, but in any event, Agent Letko excluded Sundays in his formula in calculating the number of wagering days of plaintiff's activities, and he thus arrived at the figure of 56 days by adding 27, 26 and 3 days for the three months August, September and October respectively. See Exhibit D, Agent Letko's Work Sheet, at pp. 1,3.

While there is some dispute over whether the larger amount of money and betting receipts seized in the BelAir Men's Shop on October 4, 1967, belonged to plaintiff or to plaintiff's employee, who plaintiff claimed ran his own independent bookmaking business, I resolve this issue in favor of the defendant because of the failure of plaintiff to carry his burden of proof. There was ample evidence, I find, for Agent Letko to have determined that the money in the BelAir Men's Shop also was part of plaintiff's business, e.g., the testimony of the state police investigators indicated that plaintiff would deliver paper bags containing betting slips to his store. (R. at 103, 111-112). However, it also seems clear to me that there was an erroneous assumption made on the number of days that plaintiff was actually observed engaged in gambling activities. Agent Letko testified without any reservation and clearly that the appropriate figure

to be used in computing plaintiff's gambling income on the basis of the receipts taken from him on the day of his arrest would be by the use of the exact number of days which the state police actually had him under surveillance. (R. at 136-137). Investigator Gasbara, who was the only law enforcement officer who did the actual surveillance for the state police, testified that he did not have plaintiff under surveillance for 56 days, but said unequivocally that such surveillance was carried out approximately one-third of the time between August 1 and September 26. (R. at 103-105).

Whatever the explanation for the 56-day figure, it was not shown to be rationally based on any fact recited during this hearing. ~~The only supporting~~ testimony that this was the number of ~~days of surveillance~~ came from Agent Letko himself who gave no specific source or basis in fact for it, and significantly it was contradicted by the testimony of the state police officer who in fact did the surveillance. It is not clear to me from the proof where or from whom Agent Letko received information that caused him to set the number of surveillance days at 56, particularly since there was no written record produced of the number of days of surveillance as there was a record of the monies seized and the receipts given to the plaintiff. See Pl. Exh. #1. Also unclear is the reason Agent Letko excluded Sundays (R. at 128-129) from the count of days when plaintiff was engaged in gambling activities. No basis is given for such exclusion, particularly in light of the fact that the arrests were made proximate to the 1967 World Series and baseball bets were found among the monies and wagering slips seized. (R. at 82-83).

Therefore, in my judgment, there is no factual basis for the 56-day factor in the government's assessment. It is an arbitrary figure that I find not only lacking support in the evidence but really contradicted by it. The defendant seems content to rely upon the presumption of correctness in its favor and the burden

the law places upon the plaintiff for a contrary showing. In the absence of any other proof the presumption might have sustained the defendant's position. However, in my judgment, this presumption was overcome by the credible and uncontradicted testimony of the New York State Police Officer who did the actual surveillance and, indeed, is supported by statements of Agent Letko himself who intended only to use the number of actual surveillance days in the computation of the amount of tax to be assessed. (R. at 136-137).

In conclusion, my findings of fact directed to be made by Federal Rule of Civil Procedure 52(a) are contained in this memorandum and I specifically find further: (1) plaintiff was observed to be engaged in accepting wagers by the New York State Police on one-third of the days during the period August 1 to September 26, 1967. This is a period of nineteen (19) days; (2) plaintiff was arrested on state charges of gambling activities on October 4, 1967 and was found to have \$284.00 in betting slips and wagers on his person at that time. Plaintiff admits to his gambling activities and to possession of this amount; (3) in a search of the BelAir Men's Shop, owned by plaintiff, more wagering slips and gambling monies were found in a desk. These are reasonably attributable to plaintiff's gambling activities for tax purposes and total \$1,996.72 when added to the \$284.00 found on his person at the time of his arrest; (4) plaintiff's excise tax assessment is computed by multiplying three factors together:

- (a) the daily gross income from wagering activities, \$1,996.72;
- (b) the number of days in which plaintiff was engaged in such activities based on the facts adduced here that one-third of the period August 1 to September 26, or nineteen days, plus the day of arrest, October 4, 1967, were days where plaintiff being under surveillance was obviously engaged in such activities; this yields 20 days and the days of actual surveillance were the ones the Internal Revenue Agent would solely rely upon in the computation of the assessment;
- (c) the excise tax rate of 10%; this yields \$1,996.72/day x 20 days x 10% = \$3,993.44;

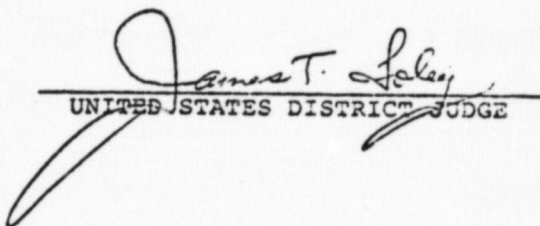
(5) the Commissioner of Internal Revenue has abated penalties on this amount and acknowledges that plaintiff has paid \$1,192.00 toward his balance due and owing.

My conclusion of law is that the court has jurisdiction over the parties and subject matter. There is failure of proof in regard to the allegations of the complaint and the relief sought by plaintiff for reasons stated herein, and the complaint is dismissed. On the counterclaim, the defendant is entitled to recover from the plaintiff the sum of \$2,801.44. Judgment shall therefore enter in favor of the defendant dismissing the complaint, and on the counterclaim for money judgment in favor of the defendant against the plaintiff in the amount of \$2,801.44.

It is so Ordered.

Dated: July 9, 1976

Albany, New York


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

It is hereby certified that service of this appendix has been made on opposing counsel by mailing four copies thereof on this 17th day of November, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

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BEST COPY AVAILABLE